85-1705

Supreme Court, U.S.
FILED
APR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CLARENCE FELDER, Petitioner,

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA and HORACE HAMILTON et uxus, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 14, 1986

QUESTIONS PRESENTED

1. Is the statute of limitations period applicable to an action brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 prior to the holding in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983):

   a) three months by application of RCW 4.16.080 (relating to arbitration awards); or

   b) six months by retroactive application of DelCostello; or

   c) three years by applocation of RCW 4.16.080 (relating to injury to the rights of a person)?

2. Is this an appropriate case through which the Supreme Court can exercise its supervisory and equitable powers to correct the

Court of Appeals below which relied upon a previous holding that the Court of Appeals had overruled and acknowledged to be clearly erroneous and which reliance has resulted in a holding in direct contravention to holdings in other Circuits?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Clarence Felder and the respondents Seafarers' International Union of North America and Horace Hamilton, his spouse, and the marital community comprised thereof. American President Lines, Ltd. was a separate appellee in the courts below respecting the appropriate statute of limitations period pertaining to an employer sued under Section 301 of the National Labor Management Relations Act of 1947; since that issue is not addressed in this petition, American President Lines, Ltd. is not named as a party herein.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CLARENCE FELDER, Petitioner,

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA and HORACE HAMILTON et uxus, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Clarence Felder respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding on November 8, 1985.

OPINIONS BELOW

The November 8, 1985 Memorandum opinion of the Court of Appeals for the Ninth Circuit was not published and is reprinted in Appendix "A" of this Petition.

The January 13, 1986 Order of the Court of Appeals denying the Petition for Rehearing En Banc is reprinted in Appendix "D".

The September 20, 1983 memorandum decision of the United States District Court for the Western District of Washington (Rothstein,J.) ordering dismissal of Petitioner's Complaint has not been reported to the Petitioner's knowledge. It is reprinted in Appendix "B".

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 185, 28 U.S.C. § 1331 and 29 U.S.C. 1337, Petitioner brought this suit in the Western District of Washington. On September 19, 1983, the Western District granted the respondent's motion for judgment on the plead-

ings for Petitioner's alleged failure to file his cause of action within the applicable statute of limitations period (see Appendix B) and dismissed Petitioner's Complaint (see Appendix E). On October 18, 1983, Petitioner appealed to the Ninth Circuit. On January 16, 1985, the Ninth Circuit stayed proceedings upon Petitioner's motion for a limited remand to the Western District for reconsideration of the Western District's dismissal of Petitioner's Complaint (see Appendix F). On March 11, 1985, the Western District denied Petitioner's motion for reconsideration (see Appendix G).

The Ninth Circuit, on November 8, 1985, entered a judgment and an unpublished opinion affirming the Western District 's dismissal of Petitioner's Complaint (see Appendix A). On January 18, 1986, the Ninth Circuit denied Petitioner's Petition for Rehearing (see Appendix D).

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked

under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent text of each of the below stated statutes which bear on this case is reprinted in the Appendix hereto. (See Appendix Index.)

-29 U.S.C. § 185

-28 U.S.C. § 1331

-28 U.S.C. § 1337

-Revised Code of Washington 4.16.080

-Revised Code of Washington 7.04.180

STATEMENT OF THE CASE

Petitioner was discharged by his employer, American President Lines, Ltd., in October of 1981. Pursuant to the governing collective bargaining agreement, he immediately submitted to Horace Hamilton, the union agent for Seafarer's International Union of North America (SIU), the respondents herein, a "beef report" setting forth his grievance that he had been

wrongfully discharged. In April of 1982, SIU informed Petitioner it would not prosecute his agreement and thirteen months later Petitioner commenced a hybrid Section 301 (Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185) action against APL alleging wrongful discharge and against the respondents alleging breach of the duty of fair representation. This Petition pertains only to the action against the respondents SIU and Horace Hamilton.

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (civil action arising under the laws of the United States) and 28 U.S.C. § 1337 (action arising under any acts of Congress regulating commerce).

The Respondents moved for judgment on the pleadings, claiming that Petitioner had commenced his action after expiration of the statute of limitations period. The trial court granted the motion and dismissed Petitioner's Complaint retroactively applying the

six month statute of limitations period established by DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed. 476 (1983). (See Appendix B.) The trial court rejected Petitioner's motion for reconsideration (see Appendix G) and, on appeal to the United States Court of Appeals for the Ninth Circuit, the dismissal of Petitioner's Complaint was affirmed (see Appendix A).

REASONS FOR GRANTING THE PETITION

I.

The various Circuit Courts considering the retroactivity of DelCostello are in conflict

While future uniformity regarding the appropriate statute of limitations period for hybrid 301 (Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185) actions was achieved by the DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) decision, the question whether to apply

DelCostello to actions accruing prior to that decision has resulted in directly opposite decisions in the various Circuit courts. DelCostello put an end to the practice of looking to the most analogous state statute as the source of the appropriate limitations period in connection with hybrid 301 actions and imposed a six month statute of limitations period. The following cited decisions reflect the disarray (the listing is not intended to be fully inclusive of all such cases): Jones v. Consolidated Freightways Corp., 776 F.2d 1458 (10th Cir. 1985) (applying Colorado two year limitations period); Aragon v. Federated Department Stores, Inc., 750 F.2d 1447 (9th Cir. 1985), cert. denied, 106 S.Ct. 229 (1985) (DelCostello applied retroactively); Saville v. Westinghouse Electric Corporation, 760 F.2d 261 (3rd Cir., 1985), cert. denied, 106 S.Ct. 280, 88 L.Ed.2d 245 (1985) (DelCostello applied retroactively); Smith v. General Motors Corp., 747 F.2d 372 (6th Cir. 1984) (en banc) (DelCostello applied retroactively); Graves

v. Smith Transfer Corp., 736 F.2d 819 (9th Cir., 1984) (DelCostello applied retroactively).

II.

Retroactive applicaton of a new and shorter statute of limitations period invariably deprives unsuspecting claimants of their day in court.

Whether to apply DelCostello retroactively must be considered in light of the seminal decision of Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Three factors were set forth which were intended to guide the inquiry into whether a judicial decision is to be applied retroactively. The last and most important factor required a determination of whether substantial inequity could result from retroactive application.

Substantial inequity has been avoided by retroactive application only where DelCostello was relied upon to lengthen the limitations period. See Peterson v. Kennedy, et al., 771

F.2d 1244 (9th Cir. 1985). However, application of DelCostello to shorten limitations periods has quite simply left numerous claimants without any avenue of redress in a manner analogous to depriving a person of property without compliance with the due process requirements of notice and hearing. Depriving Petitioner of his right to a day in court is substantially inequitable. See Jones v. Consolidated Freightways Corp., 776 F.2d 1458 (1985) for a most straightforward and eloquent consideration of retroactive application of DelCostello.

III.

Reliance upon a recognized erroneous and discredited ruling chiefly for consistency promotes and perpetuates injustice

Petitioner asserts that the appropriate source for the limitations period for hybrid § 301 actions commenced prior to DelCostello is Revised Code of Washington (RCW) 4.16.080 which provides for a three year statute of limitations period. See Washington v. North-

land Marine Co., Inc., 681 F.2d 582 (9th Cir. 1982), in which the Ninth Circuit determined that RCW 4.16.080 was the appropriate statute of limitations to apply in a § 301 hybrid action. In Petitioner's case, the Ninth Circuit found that RCW 7.04.180 (three month limitations period for actions relating to arbitration awards) was the appropriate source, and applied DelCostello retroactively to increase the limitations period.

The Court recognized that reliance upon RCW 7.04.180 was erroneous, but chose to maintain erroneous uniformity for the sake of consistency. The error resulted from the Court's misreading of the holding in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981), which characterized a suit by an employee against the employer after an arbitration award as a suit to vacate the arbitration award and accordingly applied the short limitations period for actions relating to arbitration awards. The Ninth Circuit, in Singer v. Fly-

ing Tiger Lines, Inc., 652 F.2d. 1349 (9th Cir. 1981) concluded erroneously that Mitchell also applied to actions against unions after an arbitration award. The Court recognized and corrected its error in McNaughton v. Dillingham Corp., 707 F.2d 1042 (9th Cir. 1983) cert. denied 105 S.Ct. 291 (1984). It is important to note that the Court in Singer specifically restricted its erroneous application of the Mitchell rule to actions "commenced after an unfavorable arbitral decision", supra at 1353.

In the present case, SIU failed to present Petitioner's grievance to the employer (APL) and to thereby initiate the arbitration process as required by the collective bargaining agreement. As was the case in Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983) cert. denied 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984) Petitioner "has been unable to obtain a hearing on the merits of his grievance". Edwards, supra at 1038.

The barring of a litigant's claim by the

imposition of a shortened statute of limitations period of which the litigant would not reasonably have had notice at the time of the filing of the suit is fundamentally unfair and contrary to the basic premise of due process. The Court in Edwards stated the basic policy, "Retroactive application of a shorter statute of limitations that that pertaining when the case was filed is inherently unfair." Edwards, supra at 1040.

The Court in the present case has imposed upon Petitioner a shorter statute of limitations period than was applicable at the time Petitioner filed his suit. It is the contention of Petitioner that the applicable statute of limitations period was the same that the Court found in the Edwards decision and Washington v. Northland Marine Co., Inc., 681 F.2d 582 (9th Cir. 1982).

After the erroneous holding in Singer was issued, but before Petitioner commenced his action, the Ninth Circuit issued its decision in Washington v. Northland Marine, supra.

That decision applied the RCW 4.16.080 three year limitations period to claims of members against their union where the union had failed to take the employees' grievance to arbitration. In a companion case, heard and decided by the same judges on the same days (Judge Walter I. Hoffman writing both decisions) the Court found that Mitchell does not apply to cases where "the arbitration process was never reached;", Christianson v. Pioneer Sand and Gravel Co., 681 F.2d 577 (9th Cir. 1982). Although that case concerned the claim of employees against their employer, the Court found it necessary first to determine the applicable statute of limitations to the employees' claim against their union.

Petitioner was entitled to rely upon Washington v. Northland Marine Co., Inc., supra and Christianson v. Pioneer Sand and Gravel Co., supra given the language in Singer providing that the shorter statute of limitations period for the vacation of arbitration awards was applicable "after an unfavorable arbi-

trable decision". Singer, supra at 1353.

It is a rather simple proposition that the courts should not apply the rule of stare decisis when to do so perpetuates an obvious error and grievous, unjustifiable harm results. See 21 C.J.S. Courts § 193. Petitioner here was misled by his reliance upon decisions of the Ninth Circuit, and his only failure was an inability to predict the Court's continuing adherence to an erroneous rule. As a result, Petitioner has been denied his day in court, certainly a grievous harm. Query: Had the Court ruled in Petitioner's favor, what loss was faced by the Union?

The Court here has an opportunity to: establish that protection of the rights of litigants is more important than mere administrative convenience; declare retroactive reduction in a limitations period is inappropriate; and eliminate the conflicting decisions being issued by the various Circuit Courts.

CONCLUSION

Based on the foregoing, this Petition for certionari should be granted. At the time Petitioner filed his action, previous case law had established a three year statute of limitations period. Subsequent to that filing, the Ninth Circuit decided to rely upon its previous erroneous ruling and reach back in time to establish a different and unconscionably shorter limitations period. Considerations of justice and equity require that the judgment of the Ninth Circuit Court of Appeals be reversed and remanded for further proceedings.

Respectfully submitted,

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April 14, 1986

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APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE FELDER, Plaintiff-Appellant,	)	NO. 83-4224
v.	)	DC# C 83-627R
HORACE HAMILTON and JANE DOE HAMILTON, his wife, and the marital community composed thereof; SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, PACIFIC DISTRICT; and AMERICAN PRESIDENT LINES, LTD., Defendants-Appellees.	)	MEMORANDUM* Filed Nov 8 1985

Appeal from the United States District Court
for the Western District of Washington
District Judge Barbara J. Rothstein, Presiding

[Argued and Submitted
November 4, 1985 - Seattle]

Before: WRIGHT and REINHARDT, Circuit Judges,
and MACBRIDE, Senior District Judge.**

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit execpt as provided by 9th Cir. R. 21.

** For the Eastern District of California.

Felder appeals the dismissal of his hybrid Section 301 action against employer, union and union official. The district court held the action barred by the statute of limitation. We affirm.

BACKGROUND

Felder was discharged by his employer, American President Lines, Ltd. (APL), in October 1981. He filed a grievance report with his union but was notified in April 1982 that the union refused to prosecute.[1/] Thirteen months later, in May 1983, Felder commenced a hybrid Section 301 action against APL alleging wrongful discharge; against the union and a union official he alleged a breach of duty of fair representation.

The union moved for judgment on the pleadings, claiming that Felder's action was barred by the statute of limitation. After written argument, the district court granted the

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1 There is evidence that Felder had notice of the union's position as early as December, 1981. If true, this would not affect the outcome.

motion by order filed September 20, 1983. This order was later declared applicable to Felder's complaint against APL, by court-approved stipulation of the parties.

Felder filed a notice of appeal on October 18, 1983. In December, we stayed proceedings for 30 days to allow the parties to evaluate the newly-decided case of Edwards v. Teamsters Local No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S. Ct. 1599 (1984).

On October 25, 1984, after extensive consultation with staff, Felder moved for a "limited remand for the purpose of vesting the District Court with jurisdiction to consider Plaintiff's Motion for Reconsideration."[2/]

After determining that the district court would entertain the motion, we granted limited remand. By order of May 11, 1985, Judge

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[2] Our orders of November 14, 1984 and January 16, 1985 characterize Felder's request for reconsideration as a motion under Fed. R. Civ. P. 60(b). Apparently, Rule 60(b)(6) was intended. Such a motion must be brought "within a reasonable time."

Rothstein denied the motion for reconsideration. Felder did not appeal that order.[3/]

STATUTE OF LIMITAIONS

In dismissing the complaint, Judge Rothstein applied DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), which imposes a six-month statute of limitations on suits for wrongful discharge and breach of the duty of fair representation. Felder argued that DelCostello should not be applied retroactively.

In denying the motion for reconsideration, Judge Rothstein relied on Aragon v. Federated Department Stores, Inc., 750 F.2d 1447 (9th Cir.), cert. denied, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985), for retroactive application of DelCostello. We review this issue of law de novo. A brief history frames the statute of limitation issue.

If a union breaches its duty of fair

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3 He did not have to beacuse a Rule 60(b)(6) motion "does not affect the finality of a judgment."

representation, the injured member has a cause of action under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. Vaca v. Sipes, 386 U.S. 171, 177, 186-88 (1967). Since that Act provides no statute of limitation for § 301 suits, it was long our practice to apply the most "appropriate" state statute, following Auto Workers v. Hoosier Corp., 383 U.S. 696, 704-705 (1966). See, e.g., Price v. Southern Pacific Transp. Co., 586 F.2d 750, 752 (9th Cir. 1978).

We did not always designate the same state statute as "appropriate." In Price, we chose the three-year California statute that governed "an action upon a liability created by statute, other than a penalty of forfeiture." Price, 586 F.2d at 753.

In 1981 however, we said:

> The Supreme Court decided in United Parcel Service, Inc. v. Mitchell . . .that a suit against a union and employer following an arbitration award could best be characterized as a suit to vacate the arbitration award. Many states have short statute of limitations applicable to such actions . . . under this type of limitations statute.

Singer v. Flying Tiger Line, Inc., 652 F.2d 1349, 1353 (9th Cir. 1981).

Singer misread Mitchell, which was concerned with a suit only against an employer, not against a union. The error was corrected in 1983 in a case applying the two-year Oregon malpractice statute to a claim against a union, while retaining the very short Oregon arbitration statute for the claim against the employer. McNaughton v. Dillingham Corp., 707 F.2d 1042 (9th Cir. 1983), cert. denied, 105 S. Ct. 291 (1984).

One day after McNaughton was decided, the Supreme Court held that the six-month statute in Section 10(b) of the National Labor Relations Act, 19 U.S.C. § 160(b), should be applied to suits against both employers and unions. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). Initially, we refused to give DelCostello retroactive effect. Edwards, 719 F.2d at 1040-41; see also Barina v. Gulf Trading & Transp. Co., 726 F.2d 560, 564

(9th Cir. 1984). We now apply the six-month statute retroactively only to lengthen the (state) limitation period that would otherwise control. Peterson v. Kennedy, et al., 771 F.2d 1244, 1251 (9th Cir. 1985).

Felder's right of action accrued by April 1982, after Singer but before McNaughton and DelCostello. He brought suit 13 months later. The union contends that Felder's suit is untimely under the rule of Singer. Washington has a three-month statute of limitation for motions to vacate arbitration awards. RCW 7.04.180. Felder argues instead for the three-year tort statute of RCW 4.16.080(2), citing Scoggins v. Boeing Co., 742 F.2d 1225 (9th Cir. 1984), or at least for the two-year "catch all" Statute in RCW 4.16.130. He distinguishes Singer on two grounds: (1) its application of Mitchell to suits against unions was declared erroneous in McNaughton, and (2) it is limited to suits "following an arbitration award."

This dispute is settled by our recent

decision in Aragon v. Federated Dept. Stores, 750 F.2d 1447 (9th Cir.), cert. denied, 54 U.S.L.W. 3252 (U.S. Oct 15, 1985). Aragon's cause of action accrued almost at the same time as Felder's, in March of 1982. We noted that our decisions were "in a state of disarray" regarding the applicable statute of limitation. Id. at 1451. Singer was the most recent authority in 1982, but Singer had been "corrected" (as to suits against unions) by McNaughton. We said:

> This court now faces a choice. We can . . . hold that Aragon's suit against the Local . . . is time barred [under the Singer rule]. Or we can address the issue . . . whether Singer should continue to bar claims against unions . . . despite the acknowledged error of that holding. We choose the first approach.

Id. at 1453. We relied on the discredited Singer rule chiefly for consistency, and we showed a disinclination to rework past decisions now that uniformity had been imposed by DelCostello:

> Untangling our past web of decisions . . . would serve no useful purpose. . . . The law of this circuit can

> be construed as applying the same statute of limitations to actions against both unions and employers at the time that Aragon's claim arose; we choose that construction.

Id. at 1453-54.

Felder's first ground for distinguishing Singer is explicitly removed by Aragon. Despit its errors, Singer will be applied to suits that accrued against unions in 1982. Felder's second ground fails also. Aragon applies the same statute to actions against unions and employers, so Felder may not limit its effects to suits following an arbitration award. For suits against employers, we have applied the rule of Singer and Mitchell whether or not there was arbitration. See Scoggins, 742 F.2d 1228 n.3; Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348 (9th Cir. 1984). Aragon established a similar uniformity for suits against unions. Cf. Barina, 726 F.2d at 561 n.1.

Under Aragon, Felder's action against his union is limited by the same statute

applicable to actions against employers. That statutory period (three months, according to RCW 7.04.180) applies whether or not the action follows arbitration. Since that period is shorter than the six months prescribed by the Supreme Court, DelCostello should be given retroactive effect. The decision of the district court dismissing Felder's action as untimely should be affirmed.

SANCTIONS ON APPEAL

We have discretion to assess costs and attorney's fees as a penalty for bringing a frivolous appeal. Fed. R. App. P. 38; 28 U.S.C. § 1912. An appeal is frivolous if the result is obvious or if the arguments are wholly without merit. Int'l Union of Bricklayers, etc. v. Martin Jaska, Inc., 752 F. 2d 1401, 1406 (9th Cir. 1985); Gattuso v. Pecorella, 733 F. 2d 709, 710 (9th Cir. 1984) (per curiam).

Felder's appeal against the union is not frivolous. Aragon was decided after he filed the appeal. In any case, our opinion

in Aragon is not so clear that the result here was obvious. Felder's attempt to distinguish Singer and Aragon on the ground that they involved an arbitration award is not wholly meritless. The union's request for fees and costs on appeal is denied.

By contrast, Felder's appeal against APL is frivolous. His brief "concedes that his claim against his employer may have been time-barred." His repeated references to McNaughton v. Dillingham Corp., 707 F. 2d 1042 (9th Cir. 1983), leave no doubt that Felder knew his suit against APL was time-barred.

Moreover, Felder's opening brief indicated that the appeal was limited to his claim against the union. APL sought a stipulation of dismissal based on this concession. Felder refused. Our court's conference attorney advised APL to file a brief to protect its interests. Felder's appeal against APL is frivolous and unreasonable.

Considering all of the circumstances

surrounding this appeal, however, we conclude that a modest award of fees is warranted. APL is awarded attorney fees of $100 and its costs on this appeal.

The judgment of the district court is AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLARENCE FELDER, Plaintiff, v. HORACE HAMILTON and JANE DOE HAMILTON, his wife, and the marital community comprised thereof; SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, PACIFIC DISTRICT; and, AMERICAN PRESIDENT LINES, LTD., a corporation, Defendants.	NO. C83-627R ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON PLEADINGS FILED SEP 20 1983

THIS MATTER comes before the court on defendants' Motion for Judgment on the Pleadings. After reviewing the memoranda filed by the parties in support of and in opposition to the motion, together with the files and records herein, the court finds and rules as follows:

Defendant has moved for judgment on the pleadings pursuant to DelCostello v. Inter-

national Brotherhood of Teamsters, 103 S. Ct. 2281 (1983). Plaintiff argues that DelCostello should not be given retroactive application and that, therefore, his case should not be barred.

This court finds that DelCostello has retroactive application and that, therefore, plaintiff's action is barred by the applicable six month statute of limitations.

It is now, therefore, ordered as follows:

Defendants' motion for judgment on the pleadings is hereby GRANTED. This matter is DISMISSED with prejudice.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 19th day of September, 1983.

s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE FELDER, Plaintiff-Appellant, v. HORACE HAMILTON and JANE DOE HAMILTON, his wife, and the marital community comprised thereof; SEAFARER'S INTERNATIONAL UNION OF NORTH AMERICA, PACIFIC DISTRICT; and AMERICAN PRESIDENT LINES, LTD., a corporation, Defendants-Appellees.	)	NO. 83-4224 CV 83-627 R FILED JAN 23 1986

APPEAL from the United States District Court for the _____ District of _____.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of WASHINGTON (SEATTLE) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered NOVEMBER 13, 1985

APPENDIX "D"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE FELDER, Plaintiff-Appellant, vs. HORACE HAMILTON and JANE DOE HAMILTON, his wife, and the marital community composed thereof; SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, PACIFIC DISTRICT; and AMERICAN PRESIDENT LINES, LTD., Defendants-Appellees.	NO. 83-4224 DC# C 83-627R O R D E R FILED JAN 13 1986

Before: WRIGHT and REINHARDT, Circuit Judges, and MACBRIDE, Senior District Judge.

The Petition for Rehearing En Banc has been considered and is denied after being circulated to all active judges of the court. No judge requested a vote on the petition.

APPENDIX "E"

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CLARENCE FELDER,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	DOCKET NO. C83-627R
v.	)	
	)	JUDGMENT
HORACE HAMILTON,	)	
et ux, et al,	)	FILED
	)	
Defendants.	)	SEP 23 1983

This action came on for trial (hearing) before the court, United States District Judge (Magistrate) Barbara J. Rothstein presiding. The issues having been duly tried (heard) and a decision having been duly rendered, it is ordered and adjudged that the plaintiff takes nothing, and the complaint be dismissed.

Dated at:
Seattle, Washington

Date:
September 23, 1983

s/ Kelli Imlay
Deputy Clerk of Court

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE FELDER,	No. 83-4224
Plaintiff-Appellant,	DC# CV 83-627 BJR
v.	Western Washington (Seattle)
HORACE HAMILTON, et al.,	ORDER
Defendants-Appellees.	FILED JAN 16, 1985

Before: ANDERSON, Circuit Judge

Appellants, motion of December 21, 1984, for a limited remand is granted. This case is remanded for the purpose of vesting the district court with jurisdiction to entertain appellant's motion for reconsideration under Fed. R. Civ. P. 60(b).

The remand shall expire 90 days from the entry of this order or upon disposition of the Rule 60(b) motion, whichever occurs first.

1-J 1/9/85

APPENDIX "G"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLARENCE FELDER,	)	
	)	
Plaintiff,	)	NO. C83-627R
	)	
v.	)	ORDER DENYING
	)	PLAINTIFF'S MOTION
HORACE HAMILTON,	)	FOR RECONSIDERATION
et ex., et al.,	)	
	)	
Defendants.	)	FILED
	)	MAR 11 1985

THIS MATTER comes before the court on plaintiff's motion for reconsideration of the dismissal of his complaint by order of September 19, 1983. Plaintiff appealed the dismissal and the Ninth Circuit remanded the case for the purpose of giving this court jurisdiction to hear plaintiff's motion. Having considered the motion together with all memoranda filed in support of and in opposition thereto, the court finds and rules as follows:

Aragon v. Federated Department Stores, Inc., No. 83-6435 (9th Cir. Jan. 11, 1985),

is dispositive of plaintiff's motion. Pursuant to the decision in that case, this court concludes that Plaintiff's claims fall within a limited exception to the rule enunciated in Edwards v. Teamsters Local 36, 719 F.2d 1036 (9th Cir. 1984). The six-month limitations period set forth in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), is applicable to plaintiff's causes of action against both his employer and the union.

Plaintiff's motion for reconsideration is accordingly DENIED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record

DATED at Seattle, Washington this 11th day of March, 1985

s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX "H"

29 U.S.C. § 185

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violaton of contracts between and employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect com-

merce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena (sic),

or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, ch. 120, title III, § 301, 61 Stat. 156.)

"H3"

Appendix "I"

28 U.S.C. § 1331

§ 1331. Federal question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX "J"

28 U.S.C. § 1337

§ 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: . . . .

(June 25, 1948, ch. 646 Stat. 931; Oct. 20, 1978, Pub. L. 95-486, § ((a), 92 Stat. 1633; Oct. 10, 1980, Pub. L. 96-417, title V, § 505, 94 Stat. 1743; Jan. 12, 1983, Pub. L. 97-449, § 5(f), 96 Stat. 2442.)

APPENDIX "K"

Revised Code of Washington 4.15.080

RCW 4.16.080 Actions limited to three years. Within three years: . . . .

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated; . . . .

1. Enacted Code 1881 § 28. Based on Laws 1869 p 8 § 28, Laws 1854 p 363 § 4.

2. Amended by Laws 1923 ch 28 § 1 p 70, (1) substituting "state for "territory" in subd 6: (2) substituting "limitation" for "penalty" after "different" in subd 6; (3) adding the two provisoes at end of subd 6; and (4) substituting "to" for "of" before "marriage" in subd 7.

APPENDIX "L"

Revised Code of Washington 7.04.180

RCW 7.04 180 Notice to vacate, modify, or correct award--Stay. Notice of a motion to vacate, modify or correct an award shall be served upon the adverse party, or his attorney, within three months after a copy of the award is delivered to the party or his attorney. Such motion shall be made in the manner prescribed by law for the service of notice of a motion in an action. For the purposes of the motion any judge who might make an order to stay the proceedings, in an action brought in the same court, may make an order to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Enacted Laws 1943 ch 138 § 18 p 432.

CERTIFICATE OF SERVICE

I, Terence Toby Savery, a member of the Bar of this Court, hereby certify that on this 14th day of April, 1986, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage prepaid, to William A. Roberts and William H. Song, attorneys, 201 Elliott Avenue West, Suite 500, Seattle, WA 98119, counsel for all Respondents herein, and to Douglas M. Duncan, attorney, 3300 Seattle-First National Bank Building, Seattle, WA 98154, counsel for American President Lines, Ltd., one of the appellees below that is not a party hereto. I futher certify that all parties required to be served have been served.

Terence Toby Savery

Terence Toby Savery
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Seattle, WA 98105
(206) 545-8422

Counsel for Petition

(2)

Supreme Court, U.S.
FILED
MAY 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1705

IN THE

Supreme Court of the United States

October Term, 1985

CLARENCE FELDER *Petitioner,*

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA and HORACE HAMILTON *et uxus,*
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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16p

QUESTIONS PRESENTED FOR REVIEW

1. Does the Ninth Circuit's holding that Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), may be applied retroactively to lengthen the otherwise applicable statute of limitations in a hybrid § 301 cause of action conflict with other Circuits?

2. Does the Ninth Circuit's holding that unions and employers should be governed by the same limitation period in a hybrid § 301 action conflict with other Circuits?

LIST OF PARTIES

Respondents adopt the statement of Petitioner.

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No. 85-1705

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CLARENCE FELDER, Petitioner,

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA and HORACE HAMILTON, et uxus, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Respondents, Seafarers' International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, and Horace Hamilton,

et uxus, respectfully submit the following Opposition to Petitioner's request for a writ of certiorari.

OPINIONS BELOW

Respondents adopt the statement of Petitioner.

JURISDICTION

Respondents adopt the statement of Petitioner.

STATUTES INVOLVED

Respondents adopt the statement of Petitioner.

STATEMENT OF THE CASE

Respondents adopt the statement of Petitioner.

LEGAL ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

A. The Instant Case Does Not Create a Conflict Among the Circuits with Respect to the Retroactivity of Del Costello.

Petitioner contends that the Ninth Circuit's decision in the

instant case creates a conflict in the various circuits as to the retroactive application of Del Costello v. International Brotherhood of Teamsters, 468 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The Ninth Circuit's decision, however, creates no conflict on this issue.

The Ninth Circuit's decision that Del Costello may be applied retroactively does not conflict with the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits. Those circuits have all held that Del Costello should be given retroactive effect. Smith v. General Motors Corp., 747 F.2d 372, 374 (6th Cir., 1984).

Nor does the Ninth Circuit's

decision conflict with the Tenth Circuit's decision in Jones v. Consolidated Freightways Corp. of Delaware, 776 F.2d 1458 (10th Cir., 1985). The Jones case only precludes the retroactive application of Del Costello if the effect is to shorten the otherwise applicable state limitation period. In the instant case, the Ninth Circuit ruled that Del Costello could be given retroactive effect since retroactivity would only serve to lengthen the applicable state limitation period governing Petitioner's action; the limitation period governing Petitioner's action would be increased from the 3-month period under RCW 7.04.180 to the 6-month limitation period under Del Costello.

B. The Ninth Circuit's Reference to the Appropriate State Statute of Limitations Governing Petitioner's Action Does Not Create a Conflict with the Decision of Another Federal Court of Appeals on the Same Matter.

The Ninth Circuit in the instant case ruled that a hybrid § 301 action against a union alleging breach of the duty of fair representation which accrued after Singer v. Flying Tiger Lines, Inc., 652 F.2d 1349 (9th Cir., 1981)(decided August 13, 1981), and before McNaughton v. Dillingham Corp., 707 F.2d 1042 (9th Cir., 1983)(decided June 7, 1983), would be determined under RCW 7.04.180. Petitioner's cause of action accrued in either December, 1981 or April, 1982.

RCW 7.04.180 sets a 3-month limitation period for actions to vacate an arbitration award. The Ninth Circuit's decision to

establish a window period between the Singer and McNaughton cases in which this limitation period governs confirms the same court's decision in Aragon v. Federated Department Stores, Inc., 750 F.2d 1447 (9th Cir., 1985), cert. den., 106 S.Ct. 229, 88 L.Ed.2d 229 (1985), and Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir., 1984), cert. den., 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985).

The Singer decision put plaintiffs in a hybrid § 301 action against a union on notice that the same limitation period would govern against both unions and employers. The Ninth Circuit further concluded that the applicability of Singer's limitation period to a union did not

depend upon whether the § 301 action followed an arbitration award. The Ninth Circuit noted that for § 301 suits against employers, the court has applied the Singer rule whether or not the action follows arbitration. See Scoggins v. Boeing Co., 742 F.2d 1225, 1228, n.3 (9th Cir., 1984); Buscemi v. McDonnell Douglas Corp., 736 F.2d1348, 1351 (9th Cir., 1984); Barina v. Gulf Trading & Transportation Co., 726 F.2d 560, 561, n.1 (9th Cir., 1984).

Whether there is an arbitration award or the union refuses to arbitrate a grievance, in both cases a duty of fair representation plaintiff is attempting to resurrect a grievance laid to rest under the

contractual grievance procedure. The Ninth Circuit in the instant case has realigned the limitation periods applicable to unions and employers in such situations to ensure that both are under a uniform limitation period.

Petitioner alleges that the Ninth Circuit's decision is in conflict with other circuit decisions. Petitioner, however, fails to reveal any conflict with other circuits resulting from the Ninth Circuit's holding that Petitioner's action is governed by RCW 7.04.180 in the window period following Singer, and that this limitation period is applicable whether or not the suit follows an

arbitration award. This case, as did the Aragon and Glover decisions, establishes a logical consistency within the Ninth Circuit in applying the same limitation period for actions against employers and unions which accrued prior to Del Costello. The decision brings order to an acknowledged state of prior disarray on the issue in the Ninth Circuit. The decision does not create a continuing conflict with any other circuit decision.

C. The Facts of This Case Require Denial of the Petition for Certiorari.

The Supreme Court has consistently denied certiorari of cases arising out of the Ninth Circuit involving the Del Costello

retroactivity issue. Edwards v. Teamsters Local 36, 719 F.2d 1036 (9th Cir., 1983), cert. den., 465 U.S. 1102, 104 S.Ct. 1599 (1984); Glover, supra, cert. den., 105 S.Ct. 2357, 86 L.Ed.2d 258; Aragon, supra, cert. den., 106 S.Ct. 229, 88 L.Ed.2d 229. There is no issue distinguishing the instant petition for certiorari from the above cases. Passage of time will shortly moot any controversy as to the appropriate statute of limitations in the Ninth Circuit for hybrid § 301 actions against a union which accrued prior to Del Costello. There is no vital question of federal law posing a continuing controversy here.

CONCLUSION

Based upon the foregoing discussion, Respondents respectfully requests the United States Supreme Court to deny the petition for certiorari.

Respectfully submitted,

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